

Case No. SC92770

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IN THE SUPREME COURT OF MISSOURI

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VOLKSWAGEN GROUP OF AMERICA, INC.

Appellant,

v.

DARREN BERRY et al.,

Respondents.

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**SUBSTITUTE BRIEF OF APPELLANT**

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Appeal from the Circuit Court of Jackson County, Missouri, at Independence

Honorable Michael W. Manners, Division 2

Circuit Court Case No. 0516-CV01171-01

Court of Appeals, Western District Case No. 73974

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### **JURISDICTIONAL STATEMENT**

This appeal was timely filed at the Court of Appeals, seeking review and reversal of the trial court's final order and judgment of the Circuit Court of Jackson County, at Independence, in Case No. 0516-CV-01171-01, entered May 3, 2011 (LF XXXVII 6809-6811; see Appendix, A17-A19), insofar as it awarded attorney's fees of \$6,174,000 to Class Counsel under the Missouri Merchandising Practices Act. The order and judgment also granted final approval of the settlement terms for eligible class members; Volkswagen Group of America ("VWGoA") does not appeal from that portion of the order and judgment. The Court of Appeals had jurisdiction under R.S.Mo. § 512.020 (2010), and this case was within the general appellate jurisdiction of the Missouri Court of Appeals, Western District, pursuant to Article V, Section 3 of the Missouri Constitution. The matter was properly before the Court of Appeals because the appeal does not invoke the validity of any treaty or statute of the United States and VWGoA does not challenge the validity on its face of any statute or provision of the Constitution of this State, or any other matter within the exclusive or original jurisdiction of the Supreme Court of Missouri.

The Court of Appeals handed down its Opinion ("Op.") on June 12, 2012. (See Appendix, A1-A16) After the Court of Appeals denied Applications for

Transfer timely filed by both parties, the parties each filed Applications for Transfer with the Supreme Court. By Order of the Supreme Court dated September 25, 2012, both Applications were granted and the matter was ordered transferred. Mandate was issued by the Court of Appeals on September 26, 2012, ordering that the cause be transferred to the Supreme Court accordingly.

### **SUMMARY OF CASE**

Plaintiffs brought a putative nationwide class suit for allegedly defective window regulators on certain Volkswagen vehicles. The trial court certified only a Missouri state class under the Merchandising Practices Act (“MMPA”) claims; and declined to certify plaintiffs’ nationwide claims for breach of warranty, brought under Michigan law. After several years of litigation, but without any undue or unexpected delay (Op. at 10), the case settled before trial. The settlement offered reimbursement or free repair for any window regulator failure in the first ten years of vehicle service plus \$75 per shop visit. No non-monetary relief of any nature was provided. The parties could not come to agreement on attorney fees payable to Class Counsel.

The trial court conducted a three-day hearing on attorney fees, which it deferred to receive and consider comprehensive data on the claims that had been filed, and the amount paid to class members. VWGoA’s total payout, the

only relief provided to any class member, was \$125,261, paid to 130 Missouri consumers who claimed to have experienced window regulator failures at any time during the first ten years of vehicle service. (Op. at 3.)

The trial court awarded Class Counsel fees of \$6,174,000, comprised of a “lodestar” fee of \$3,087,000 that was then doubled by applying a “multiplier” of 2.0. VWGoA appealed the fee award; no cross-appeal was filed by plaintiffs.

On appeal, the Court of Appeals reversed the 2.0 multiplier, but made no further adjustment to counsel’s “lodestar” fee of \$3,087,000, thus allowing an award of \$3,087,000 with respect to a total class recovery of \$125,261.

### **STATEMENT OF FACTS**

#### *A. Background – Pleadings - Proposed Nationwide Class*

Plaintiffs’ Class Action Petition, filed January 15, 2005, charged VWGoA with selling Jettas, Golfs, GTIs and Cabriolets (“A3 platform” vehicles) during model years 1995 to 1999 (“Subject Vehicles”, “Class Vehicles”) with “defective” window regulators.<sup>1</sup> These components were allegedly prone to

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<sup>1</sup> An automotive “window regulator” is an assemblage of mechanical components which holds the window glass in place and moves it up or down in response to input from the window motor or hand-operated window crank.

failure from causes other than external damage (e.g., collision, fire, flood, vehicle theft, etc.)

Plaintiffs sought a nationwide class, under Michigan warranty law, as to express and implied warranty claims, and alternatively, a Missouri state class asserting only MMPA claims, seeking damages and injunctive relief, plus attorney fees. On October 20, 2005, Class Counsel amended the petition to include California in their nationwide warranty class. (Def. Ex. 135; Tr. 269:15-270:10.) The Amended Petition sought certification of a nationwide class of all present and former owners of approximately 500,000 vehicles for breach of express and implied warranty, praying for damages, injunctive relief and attorney fees. (Tr. 272:2-8.) In 2009, the petition was further amended to add a prayer for punitive damages.

*B. Certification – Missouri MMPA claims only – Litigation*

By order dated November 26, 2007, the trial court denied certification of plaintiffs' requested nationwide warranty class under Michigan law, but did certify a Missouri statewide class on the MMPA claim only. (Order and Judgment dated Nov. 26, 2007, LF X 1695-1717.) The certified class included

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Window regulators must be located just inside the outer skin of the vehicle rendering them inherently susceptible to externally caused damage.

5,290 vehicles with approximately 22,000 class members (Tr. 280:19-281:4; 574:13-575:3, 598:16-599:20), barely 1% of the rejected nationwide class. Litigation, including settlement efforts, went forward, without any “undue or unanticipated delay.” (Op. at 10)

*C. The Settlement*

The court at no time entered any finding of liability against VWGoA. On May 17, 2010, shortly before the case was scheduled to go to trial, the parties entered into a Settlement Agreement. (Def. Ex. 117.) VWGoA did not admit any liability in the Settlement Agreement, which provided that, upon approval by the trial court, all claims which were or could have been made against VWGoA were to be dismissed with prejudice. (Def. Ex. 117, ¶ 2.)

The relevant provisions of the settlement (Def. Exh. 117, Art. 4), and proceedings thereunder were summarized by the Court of Appeals as follows:

“The Settlement Agreement provided for a division of the class into two groups who had experienced window regulator failures within ten years of the vehicle going into service. The first group, class members who had repaired the regulators, was to be reimbursed for the repair or replacement and compensated \$75 for each incident. The second group, class members who had not repaired a failed window regulator, was to receive repair at an authorized VWGoA

dealer within ninety days 'of the date on which Notice is mailed,' and a payment of \$75. VWGoA was to pay the costs of notice and administering the settlement.

"In June 2010, the trial court granted preliminary approval of the settlement and ordered notice disseminated to the class. A third-party company, Rust Consulting (Rust), was approved by the trial court to be the claims administrator. Rust published a class notice as an advertisement in four Missouri newspapers on July 17, 2010. The project administrator testified that they mailed notice to 22,304 class members, established a toll-free number, and set up a post office box and a website. Of the mailed notices, 6,150 were returned as undeliverable; 3,983 of these were resent to updated addresses. One hundred other notices were returned with forwarding addresses and Rust forwarded those that were returned by October 11, 2010.

"Class members were required to submit the claim form within ninety days of mailing, postmarked by October 11, 2010. The claims form required the first group, class members who had repaired or replaced the failed part, to submit a receipt for purchase of the part, and/or to submit 'one or more receipt(s) that describe(s) each documented incident or workshop visit,' showing that 'a Window

Regulator failure was diagnosed, repaired, replaced or purchased and . . . contain[ing] the date and location of the facility.’ The claims form defined ‘receipt’ and provided for an alternative procedure of certification if a receipt was not available, which required the class member to provide ‘certification statement[s]’ and ‘proof of payment of the repair and/or replacement.’ The second group, class members who had not repaired a regulator but had experienced a failure, was required to ‘set forth . . . a statement of the date, nature and circumstances of each such failure, the reasons why [the class member had not] had the failure repaired until now, and the names, addresses and telephone numbers of other persons who have knowledge of these facts and can verify them.’ The notice further provided that reimbursement would be conditioned on court approval.” (Op at 2-3)

The Settlement Agreement requires no other payment, conduct or action by VWGoA with respect to the settlement class or any member of it. (Def. Ex. 117, Ex. A-3, Claim Form; Def. Ex. 120; Tr. 292:1-295:18.)<sup>2</sup> Nothing

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<sup>2</sup> Class representatives and class members who were deposed received additional incentive payments.

in the Settlement Agreement establishes or estimates the total amount VWGoA must pay, or the number of persons who experienced a qualifying window regulator repair or failure. No class member filed an objection to the settlement. Only one member of the settlement class requested exclusion. (Tr. 575:13-15) There are no disputes as to the correct disposition of any claims.

*D. Fairness Approval – Final Regardless of Fee Dispute and Appeals*

In urging the Circuit Court to approve the settlement as fair and reasonable, Class Counsel stated that “The reimbursement payments offered under the terms of the settlement are the type of relief Plaintiffs hoped to obtain at trial, assuming they prevailed.” LF XXXIV 6217. At the fee hearing, Class Counsel acknowledged that nothing more could have been done to encourage eligible class members to file a claim. (Tr. 607:22-608:3)

In a ruling which neither side has challenged, the trial court approved the settlement terms as “fair and reasonable.” (Appx. at 19) As provided under the Settlement Agreement, “[a]ny . . . appeal or petition for a writ of certiorari pertaining solely to the award of the attorneys’ fees or expenses provided for in this Agreement will not in any way delay or preclude the Judgment from becoming Final.” (Def. Ex. 117, sec. 1.09) Accordingly, the trial court’s approval of the settlement has become final, allowing all required reimbursements to be paid and all repairs to be performed.

*E. Value of Class Recovery - not more than \$125,261.34.*

The total value of all 130 valid claims made by the settlement class, including any pending claims, will not exceed \$125,261.34. (Def. Ex. 126; Tr. 281:14-283:6.)

*F. Evidentiary Hearing – Competing Settlement Valuations*

The parties were unable to agree on attorney fees, either between themselves or in mediation as provided in the Settlement Agreement. The fee issue and any award of fees were made separate from approval of the settlement on the merits, so that appeals such as this one would not affect the finality of the court's judgment approving the settlement. (Def. Ex. 117, sec. 1.09)

By September 16, 2010, the date initially scheduled for the fairness hearing, the claims period had not yet closed. Accordingly, the trial court deferred ruling on fees until after the claims period was over, when the value of the claims by class members would be known. The trial court further stated that evidence on the fee issue would be taken in a full evidentiary hearing through live testimony rather than by affidavit, based in large

measure on the need to have a complete record, for potential appellate review of the attorney's fee award. (Tr. 13-22.)<sup>3</sup>

The evidentiary hearing took place on December 22 and 23, 2010 and January 20, 2011. Class Counsel presented testimony by one of their firm's members, one of defendant's counsel, the discovery master and a local Kansas City attorney, as to the history of the case, number of hours expended, the rates charged, their expenses, and the alleged benefits obtained by the class. (Tr. 160-545.)

During the course of the litigation, VWGoA was selling only one of each of the four regulators installed on each vehicle every other week for each Missouri dealer (Tr. 644-649) – a usage rate barely sufficient to replace crash-damaged parts. Based on these figures, approximately one year before the case settled, VWGoA had estimated its maximum total reimbursement exposure at no more than \$230,000, and shared its estimate with plaintiffs, based on warranty/goodwill payment data produced in discovery. (Def. Exh. #112, at p. 3.) At the hearing, with the actual claims received and paid

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<sup>3</sup> All other transcript citations in this brief are to the transcript of the evidentiary hearing held on December 22-23, 2010 and January 20, 2011, a single volume consisting of pages 1-751.

known, VWGoA argued to the trial court, based on the vindication of its own estimate, that when Class Counsel decided to file this case in 2005, despite having previously withdrawn a similar lawsuit, they misevaluated its prospects and value, requiring that their lodestar be significantly reduced to account for this *de minimis* outcome.

For their part, at the hearing, Class Counsel sought to justify their \$7.9 million fee demand as “reasonable” by claiming that the settlement provided class members with \$23 million in alleged “potential benefits.” VWGoA strongly challenged Plaintiffs’ claim as contrary to the express terms of the settlement, which provided no benefit other than reimbursement payments, and as unsupported by any competent evidence.

At the stipulated average repair cost of \$450.18 per window regulator, Plaintiffs’ \$23 million “potential benefit” figures would require a finding that each of the 22,310 members of the Settlement Class had personally experienced an average of more than two failures of the subject part, adding up to 6.5 failures per vehicle. The only “evidence” tendered by Plaintiffs for this proposition, over VWGoA’s objection, was the testimony of one of Class Counsel, Todd Hilton. (Tr. 251-53.)

Mr. Hilton’s testimony on this subject was not based on any claimed knowledge or expertise, but consisted solely of hearsay representations as to

what an expert economic witness who Class Counsel did not call at the hearing would have said had he been called. The trial court stated that “I guess there’s no foundation to establish that people like Mr. Hilton opining as to the pay-out value of – maximum value available on a class action settlement . . . that that’s the kind of information typically relied on by somebody opining as to the ultimate issue of attorney’s fees.” (Tr. 256:13-20) The trial court also acknowledged that the “potential benefit” figure sponsored by Class Counsel “includes speculation as to what could have been paid out but was not.” Nevertheless, the trial court declared that the missing foundation could be “easily established” and/or was “implicit in the testimony,” and admitted the Hilton “speculation” without requiring the missing foundation. No documents, data, report or analysis by the absent expert were offered or admitted at the hearing and no further foundation, “implicit” or otherwise, was laid for it. (Tr. 250:9-263:7)

Though it admitted the “testimony” of Attorney Hilton, the trial court in its Judgment made no mention of VWGoA’s estimate and the uncontradicted testimony of VWGoA’s expert witness, who appeared in person, whose testimony under oath was admitted at the hearing without objection, and whose testimony was consistent with that of the class representative plaintiffs themselves. Robert Lange testified from personal experience, without

contradiction, that during an extensive high-level career at General Motors, he personally oversaw approximately 290 recalls and field service and repair campaigns in which response rates of 80-90 percent of eligible vehicles were the norm, even though such programs never included added inducements like the \$75 per shop visit cash payment provided in the Settlement Agreement. (Tr. 656:10-657:22.)

Mr. Lange further opined, without objection, that the claims process under the Settlement Agreement - a complete "census" of the affected population, with a substantial financial reward for a positive response - was the best evidence of the true frequency of customer problems in the field, and was inherently superior to the type of projections and extrapolations which manufacturers must normally utilize and on which he himself had been forced to rely in assessing the existence and scope of customer safety and quality issues at General Motors. (Tr. 654:7-19)

In this connection, both class representatives and one class member testified as typical members of the settlement class. Each expressed his or her own aggravation and expense with the window regulator failures they had experienced. (Tr. 32:2-37:1, 40:18-21, 40:20-24, 52:2-15, 55:6-56:8, 60:7-11, 74:1-16.) This testimony was consistent with Mr. Lange's conclusion, based on his experience, that persons who have incurred unexplained window

regulator failure would be highly motivated to avail themselves of the opportunity to recoup such expenses provided under the Settlement Agreement, resulting in a high response rate, a conclusion consistent with VWGoA's pre-settlement estimation of its maximum reimbursement exposure at \$230,000. (Def. Exh. #112, at p. 3.)

*G. Circuit Court Decision – Issues on VWGoA's Appeal*

Though no sanctions had ever been entered, Plaintiffs asked the trial court to enter findings as to alleged pervasive misconduct and obstructive litigation tactics by VWGoA. (LF XXXVII 6719-21, 6729-34.) The circuit court declined to do so, finding instead as follows:

- This was a hard-fought case. The vigorous defense mounted by VWGoA was matched by a vigorous prosecution by Plaintiffs' counsel. (Appx. at 17)

Thus, "although the litigation lasted approximately five years, there is no finding that this was either an exceptional or unanticipated delay." (Op. at 10)

The circuit court also entered the following findings:

- Class counsel spent approximately 7,190 hours in time on this cause with a lodestar value of \$3,087,320.00. Counsel also incurred expenses of \$550,000.00.

- . . . the reasonably anticipated payment by VWGoA [to all class members] appears unlikely to exceed \$150,000. (Appx. at 17)

These findings were not challenged on VWGoA's appeal. (Expenses were stipulated). Plaintiffs did not appeal any aspect of the circuit court's decision.

VWGoA did challenge on appeal the following finding of fact by the trial court (Appx. at 17):

- Under the terms of the settlement negotiated by counsel, the potential benefit to all class members, assuming a 100% claims rate, was \$23,000,000.00.

VWGoA challenged this finding on its face, in that the "terms of the settlement agreement negotiated by counsel" in fact make no provision for any actual or "potential" benefit to any class member other than as provided therein, in that no competent evidence (i.e., nothing but Class Counsel's "testimony") had been tendered in support of it, and that the uncontradicted admissible evidence established a maximum total "potential claims exposure" not even twice the actual class recovery, based on VWGoA's estimate and Mr. Lange's testimony.

VWGoA's appeal also assigned error in the trial court's fourth conclusion of law (Appx. at 19) upon which the trial court based its \$23 million "potential benefit" finding:

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- . . . the Court believes that the reasonableness of the fees must be measured against the benefit conferred by the settlement rather than the actual amount paid out, *Van Gemert v. The Boeing Company*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980).

Lastly, VWGoA's appeal challenged the trial court's award of a 2.0 "multiplier" or enhancement, which doubled Class Counsel's "lodestar" to reach the \$6,174,000 awarded by the trial court.

#### *H. The Court of Appeals Decision*

On June 12, 2012, the Court of Appeals rendered its decision which reversed the circuit court's 2.0 multiplier but left standing the award of Class Counsel's full "lodestar" of \$3,087,000.

As summarized by the Court of Appeals, VWGoA's appeal raised the five issues now before this Court on transfer:

Volkswagen first contends that a reasonable attorney's fee award must bear a relationship to the amount of the recovery and that Class

Counsel's award is forty-nine times the class recovery and therefore grossly disproportionate. In its second point, Volkswagen argues that the trial court erred in finding that the “potential” value of the recovery was \$23 million. In its third point, Volkswagen contends the trial court erred in doubling Class Counsel's lodestar. In its fourth point, Volkswagen argues the trial court abused its discretion in that the award offends public policy and undermines the purposes of class actions. In its fifth and final point, Volkswagen argues the award violates due process. (Op. at 6)

The Court of Appeals reversed the trial court's 2.0 multiplier, on the basis that the criterion for success against which fees are to be measured cannot include speculative “potential” recoveries, in this case the \$23 million figure adopted by the trial court:

In this case, Class Counsel sought an award approximating twenty-five percent of the “potential benefit” of the settlement, which it calculated at \$23 million. And the trial court found that such an award was not disproportionately excessive in light of the potential benefit conferred on members of the class. Volkswagen argues that the use of the “potential benefit” in determining attorney's fees was improper in light of the fact that the “actual benefit” was less than \$150,000. Thus, it

argues, the result obtained does not constitute an exceptional circumstance justifying a multiplier.

Viewing the success of the suit by the potential recovery in such a claims-made settlement and assuming, as was done here, a one-hundred-percent rate of return is inappropriate. As noted, trial court itself acknowledged the prediction that “only a tiny fraction of the class members will make a claim,” and it expected the amount recovered by class members to be “unlikely to exceed \$150,000,” yet it tied the attorney's fee award to the “potential benefit” of \$23 million. Generally, the class's actual recovery should bear some relation to the fee award. [footnote] Otherwise, the award effectively rewards class counsel in a manner almost arbitrary to the relief afforded to the class and provides little incentive for counsel to ensure the class obtains full relief. Tying the consideration of class counsel's success to the actual recovery benefits the class action by “encourag[ing] more realistic settlement negotiations and agreements,” and giving class counsel “an incentive to . . . devise better notice programs, settlement terms, and claim procedures, all to the benefit of the consumers who have been harmed” and in whose names the suit was brought. *In re TJX Cos.*, 584 F. Supp. 2d at 406. (Op. at 11-12)

However, the Court of Appeals declined to further reduce Class Counsel's \$3,087,000 lodestar, finding that "where the "potential" value of the suit was \$23 million, but the class members recovered less than \$150,000, the "result" did not rebut the presumption that the lodestar represented reasonable attorney's fees." (Op. at 14) The Court of Appeals also stated that "Volkswagen's principal argument is that the attorney's fee award is unreasonable because it is so disproportionate to the actual funds recovered by the class." (Op. at 7), but did not specifically discuss the proportionality issue further in its Opinion, either in terms of Missouri law or Constitutional due process. The Court of Appeals thus implicitly found that the remaining lodestar award of 24.6 times the actual recovery of the class was not impermissibly disproportionate to the result achieved in the settlement and not an abuse of discretion "against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." (Op. at 5)

Further discussion of the details of the Opinion appears in the body of argument.

**POINTS RELIED ON**

**I. The trial court abused its discretion and erred in awarding a \$6,174,000 attorney's fee, and the Court of Appeals erred in reducing that fee only by half, when Volkswagen paid and the plaintiff class recovered \$125,261, because the fee award is unreasonable and contrary to Missouri and United States Supreme Court case law which hold that the "degree of success is the most critical factor" and that an attorney's fee must "bear some relation to the award", in that the fee award of 49 times (or, per the Court of Appeals, 24.6 times) the class recovery, which is the sole benefit conferred by the Settlement Agreement, was grossly disproportionate to the result obtained for the class.**

*O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. banc 1989)

*Hensley v. Eckerhart*, 461 U.S. 424 (1983)

*Knopke v. Knopke*, 837 S.W.2d 907 (Mo. App. 1992)

*Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516 (Mo. banc 2009)

Merchandising Practices Act, R.S.Mo. § 407.025.2

**II. The trial court abused its discretion and erred in awarding a \$6,174,000 attorney's fee, and the Court of Appeals erred in failing to**

reduce Class Counsel's \$3,087,000 lodestar, when Volkswagen paid and the plaintiff class recovered \$125,261, because the fee award is unreasonable and contrary to Missouri and United States Supreme Court case law, which hold that the "degree of success is the most critical factor" and that an attorney's fee must "bear some relation to the award", in that the trial court's finding, which the Court of Appeals implicitly affirmed, that the parties' settlement had a "potential" value of \$23 million is contrary to the express provisions of the Settlement Agreement under which "potential" and claimed benefits are one and the same in this pure "claims-made" settlement, and the finding is not supported by any other competent evidence.

*Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)

*Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844 (5<sup>th</sup> Cir. 1998)

*Hoffman v. Maplewood Baptist Church*, 409 S.W.2d 247 (Mo.App. 1966)

*Wise v. Popoff*, 835 F.Supp. 977 (E.D. Mich. 1993)

**III. The trial court abused its discretion and erred in doubling Class Counsel's lodestar fee, resulting in a fee award of \$6,174,000, because there are no rare or exceptional circumstances, as required by applicable law, to justify a multiplier resulting in fees of \$1,300 per hour**

**for lead counsel, \$750 for an associate, and \$392 for paralegals, in that this is a straightforward consumer action involving an alleged product defect, in which 98% of the nationwide class sought in Plaintiffs' Petition was eliminated when nationwide certification was denied, and the class recovered only \$125,621; rather, Class Counsel's lodestar fee should have been reduced and remitted, based on plaintiffs' limited success in this action, and the Court of Appeals erred in failing to order such a reduction.**

*Hensley v. Eckerhart*, 461 U.S. 424 (1983)

*Dale v. DaimlerChrysler*, 204 S.W.3d 151 (Mo. App. 2006)

*Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516 (Mo. banc 2009)

*Perdue v. Kenny A. ex rel. Winn*, \_\_ U.S. \_\_, 130 S.Ct. 1662 (2010)

Merchandising Practices Act, R.S. Mo. § 407.025.3

**IV. The trial court abused its discretion and erred in awarding Class Counsel 98% of the total amount the trial court ordered VWGoA to pay (and the Court of Appeals erred in awarding Class Counsel 96% of the total amount), because such a fee award offends sound public policy and threatens to cast the court system in an unfavorable light, in that it disproportionately decouples class counsel's financial incentives from those of the class, undermines the underlying purposes of class actions**

**by encouraging class counsel and defendants to settle lawsuits in a manner more favorable to counsel than to class members, and encourages meritless litigation by rewarding failure or, as here, limited success.**

*International Precious Metals v. Waters*, 530 U.S. 1223 (2000)

*Farrar v. Hobby*, 506 U.S. 103 (1992)

*J.A. Tobin Constr. Co. v. State Highway Comm'n. of Missouri*, 697 S.W.2d 183 (Mo. App. 1985)

*City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974)

**V. The trial court abused its discretion and erred in awarding attorney's fees of 49 times the class recovery, and the Court of Appeals erred in awarding attorney's fees of 24.6 times the class recovery, because such an award violates VWGoA's rights under the Due Process clauses of the U.S. Constitution and the Missouri Constitution in that the attorney fee award is grossly disproportionate to the class relief obtained, arbitrary and not based on competent evidence.**

*State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408 (2003)

*Daniels v. Williams*, 474 U.S. 327 (1986)

*Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841 (Mo. App. 2007),  
*cert. denied* 555 U.S. 824 (2008)

*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)

United States Constitution, Amendment 14

Missouri Constitution, Article I, Section 10

### **ARGUMENT**

**I. The trial court abused its discretion and erred in awarding a \$6,174,000 attorney's fee, and the Court of Appeals erred in reducing that fee only by half, when Volkswagen paid and the plaintiff class recovered \$125,261, because the fee award is unreasonable and contrary to Missouri and United States Supreme Court case law which hold that the "degree of success is the most critical factor" and that an attorney's fee must "bear some relation to the award", in that the fee award of 49 times (or, per the Court of Appeals, 24.6 times) the class recovery, which is the sole benefit conferred by the Settlement Agreement, was grossly disproportionate to the result obtained for the class.**

An attorney's fee award is reviewed for abuse of discretion. *See, e.g., Dominion Home Owners Ass'n, Inc. v. Martin*, 953 S.W.2d 178, 182-83 (Mo.App. W.D.1997). A trial court's use of an incorrect legal standard also may

constitute grounds for reversal. See, e.g., *State ex rel. Nixon v. Telco Directory Pub. Co.*, 863 S.W.2d 596, 602 (Mo. banc. 1993). Here, both standards for reversal are amply met.

The MMPA prescribes two different standards for attorney's fees. For individual claims, a prevailing plaintiff is generally entitled to recover attorney's fees "based on the amount of time reasonably expended," or in other words, the raw "lodestar". Mo.Rev.Stat. 407.025(1). For class claims, however, plaintiffs may be awarded only "reasonable attorney's fees," Mo.Rev.Stat. 407.025(2), thus importing into the statute applicable Missouri law as to the standards and limits of "reasonable attorney fees."

Here, the trial court rendered a fee award of \$6.174 million, when the plaintiff class only recovered \$125,621. The Court of Appeals eliminated the trial court's fee "multiplier", and awarded the raw "lodestar" amount of \$3.087 million. Where the entire benefit conferred on the class is \$125,621, neither outcome is a "reasonable" fee, and both are abuses of discretion.

This Court's leading case of *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. banc 1989), holds that even though there is no "established principle" that an attorney's fee may not exceed the damages awarded, "[t]he fee should bear some relation to the award." 768 S.W.2d at 71 n.13. (Emphasis added) *Accord Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 187 (Mo. Ct. App. 2002)

("An attorney's fees award must, however, bear some relation to the damage award."); *Knopke v. Knopke*, 837 S.W.2d 907, 922-923 (Mo. Ct. App. 1992)

("The degree of success...i.e., the amount recovered, is taken into account in the amount of attorneys fees awarded" [citing *O'Brien*, 768 S.W.2d at 71].)(Emphasis added) As discussed below, the *O'Brien* court cited with approval an Eighth Circuit decision that reduced a fee award from eight times to 5.3 times the damages award. *O'Brien*, 768 S.W.2d at 71.

Indeed, as noted by the Court of Appeals (Op. at 11), courts in this State have held that in determining an award of attorney's fees, "**the most critical factor is the degree of success obtained.**" *Trout v. State*, 269 S.W.3d 484, 488 (Mo. App. W.D. 2008) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). (Emphasis added) The proper fee is thus ultimately constrained by the value of the recovery obtained for the class – hence the courts' pointed emphasis on the "award," *O'Brien, supra, Williams, supra*, and "the amount recovered," *Knopke, supra*. The United States Circuit Court of Appeals for the Ninth Circuit, relying chiefly on *Hensley*, recently stressed that "the benefit obtained for the class" is "foremost" among possible adjustment factors, and requires downward adjustment of a raw lodestar figure which would otherwise threaten an attorney windfall, where only limited success was attained;

Foremost among these considerations, however, is the benefit obtained for the class. See *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983); *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir.2009) (ultimate reasonableness of the fee “is determined primarily by reference to the level of success achieved by the plaintiff”). Thus, **where the plaintiff has achieved “only limited success,” counting all hours expended on the litigation — even those reasonably spent — may produce an “excessive amount,”** and the Supreme Court has instructed district courts to instead “award only that amount of fees that is reasonable in relation to the results obtained.” (Citing *Hensley*, 461 U.S. at 436, 440) *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 941-42 (9th Cir. 2011)(emphasis added).

As the Supreme Court explained in *Hensley*, 461 U.S. at 434:

The product of reasonable hours times a reasonable rate does not end the inquiry. **There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the “results obtained.”** This factor is particularly crucial where a plaintiff is deemed “prevailing” even though he succeeded on only some of his claims for relief. (Emphasis added)

In fact, under some circumstances, the relief plaintiffs obtain may be so limited that no attorney's fees are justified because fee award statutes were never intended to "produce windfalls to attorneys." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986)).

Where, as here, a judgment provides only a "claims made" form of relief, the "results obtained," are purely and simply a number – the amount the defendant actually pays and the class actually recovers. *See, e.g., City of Riverside*, 477 U.S. at 585 ("[A] district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.") (Powell, J., concurring); *see also, Farrar v. Hobby*, 506 U.S. at 114 (1992). (No fee awarded to prevailing party where "petitioners received nominal damages instead of \$17 million in compensation damages that they sought.") In this case the value of the recovery is known. Class Counsel's "degree of success obtained" in this case is no more than \$125,261, payable to 130 individuals.

Moreover, measured against Plaintiffs' Amended Petition, which sought actual and punitive damages and injunctive relief for a putative 2,000,000+ member nationwide class, the \$125,261 "amount of damages awarded as compared to the amount sought," *City of Riverside, supra*, is almost infinitesimal. "*Hensley* permits the court to award fees for losing arguments in

support of prevailing claims, but not for losing claims.” *Pressley v. Haeger*, 977 F.2d 295, 298 (7th Cir. 1992); *Knopke*, 837 S.W.2d at 922-923; *Smith v. Borough of Dunmore*, 633 F.3d 176, 184 (3d Cir. 2011). Thus, in *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 523-24 (Mo. banc 2009), where the plaintiff prevailed on a tort claim alleging constructive discharge, but his related claims under the Missouri Human Rights Act alleging sex discrimination, race discrimination, and sexual harassment failed, this Court upheld an attorney fee award of \$22,000, where the damages awarded plaintiff totaled \$60,000, and plaintiff claimed actual attorney fees expended in the amount of \$170,149.

Here, the fee of \$3.1 million endorsed by the Court of Appeals fails to reflect Plaintiffs’ failure to obtain certification of a two million member nationwide class brought under a different legal theory (warranty), and invoking the law of a different state (Michigan), than the MMPA class that was certified. *See Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 81-92 (Mo.App. W.D. 2011) (discussing differences between warranty and MMPA claims). Here, Plaintiffs’ failed Michigan-law warranty claims on behalf of a purported nationwide class bear no more relation to their MMPA claims than Mr. Gilliland’s failed MHRA claims bore to his successful “constructive discharge” claim. In Mr. Gilliland’s case, this led to a fee award of \$22,000,

where he had asserted lodestar fees in excess of \$170,000. *Gilliland*, 273 S.W.3d at 523-24. Class Counsel's fee must reflect their failure to obtain certification of a class overwhelmingly larger than the one that was certified. Simply keying the fee award to the actual "damages awarded" or "amount recovered" automatically accomplishes this goal, without elaborate additional analysis.

Even in "constructive common fund" settings, class attorneys would not be allowed to pocket 49 times (or 25 times) their clients' recovery. *See Hensley*, 461 U.S. at 439-40; *Tusa v. Omaha Auto Auction, Inc.*, 712 F.2d 1248, 1255 (8<sup>th</sup> Cir. 1983); *O'Brien*, 768 S.W.2d at 71, n.13; *Williams*, 78 S.W.3d at 187.

Nothing in any decided case from the Missouri Supreme Court, United States Supreme Court, and the Eighth Circuit Court of Appeals remotely supports the attorney fee award of \$3.1 million (or \$6.2 million) dollars for recovery of \$125,261. In *O'Brien*, this Court specifically approved the reasoning and holding of *Tusa*, 712 F.2d at 1254-56. *O'Brien*, 768 S.W.2d at 71. In *Tusa*, as in *O'Brien*, the trial court awarded statutory damages of \$1,500 for odometer fraud. *Tusa*, 712 F.2d at 1254. The district court in *Tusa* awarded plaintiff's counsel a fee of \$12,000, denying counsel's request for a \$27,000 fee. *Id.* On appeal, the Eighth Circuit further reduced the attorney's fee award

from eight times the damage award to \$8,000, “the largest that should be allowed in this case” -- i.e. an amount 5.3 times the damage award. *Id.* at 1256. Noting the importance of considering “the amount involved and the results obtained,” the Eighth Circuit concluded that, even though the purpose of the Odometer Disclosure Act is to encourage prosecution in the face of small recoveries, the disparity between the award and the fee was “too far out of proportion . . . to be considered reasonable.” *Tusa*, 712 F.2d at 1255.

This Court’s adoption in *O’Brien* of the standards and reasoning in *Tusa*, makes it apparent that Missouri law does not permit a fee award of 24.6 times the class recovery. Even in “constructive common fund” settings, attorneys are not allowed to pocket 24.6 times the class recovery, keeping over 96 cents out of every dollar paid by defendant. *See Hensley*, 461 U.S. at 439-40; *Tusa*, 712 F.2d at 1255; *O’Brien*, 768 S.W.2d at 71, n.13; *Williams*, 78 S.W.3d at 187.

**II. The trial court abused its discretion and erred in awarding a \$6,174,000 attorney’s fee, and the Court of Appeals erred in failing to reduce Class Counsel’s \$3,087,000 lodestar, when Volkswagen paid and the plaintiff class recovered \$125,261, because the fee award is unreasonable and contrary to Missouri and United States Supreme Court case law which mandate that an attorney’s fee must “bear some relation**

**to the award, and that the “degree of success is the most critical factor”, in that the trial court’s finding, which the Court of Appeals implicitly affirmed, that the parties’ settlement had a “potential” value of \$23 million is contrary to the express provisions of the Settlement Agreement under which “potential” and claimed benefits are one and the same in this pure “claims-made” settlement, and is not supported by competent evidence.**

In this case, both courts below erred in failing to recognize that in a pure “claims made” settlement involving only the payment of money, and under the terms of the parties’ Settlement Agreement in this case, “potential” and claimed benefits are one and the same: the \$125,621 that was paid to the plaintiff class. The trial court also abused its discretion and erred in finding that there was \$23 million in “potential benefit” to the plaintiff class, even though class members received only \$125,621, and there was no evidentiary basis for the \$23 million figure. And the Court of Appeals – in a set of contradictory holdings – properly rejected the \$23 million figure as an “inappropriate” basis for a multiplier on the one hand, yet inexplicably embraced that figure as an indispensable factor in upholding a fee award of 24.6 times the actual recovery.

**First:** in this pure claims made settlement for the payment of money, and under the terms of the Settlement Agreement, the “potential” and claimed benefits are exactly the same: \$125,621, a matter which the trial court failed to recognize. As a matter of law, the only benefit offered to any class member in this case is the payment of claims, pursuant to the terms of the parties’ Settlement Agreement, which defines the eligibility for class members to recover, and the results obtained. Only those class members who in the first instance have experienced a covered window failure are eligible for relief under the settlement. There is no plausible, logical theory under which VWGoA’s payment of approximately \$125,000 to the settlement class can at one and the same time benefit its recipients to the tune of \$23,000,000 – or indeed any amount other than the one paid by VWGoA. *See Strong*, 137 F.3d at 852-53, (declining to value settlement at Class Counsel’s “fund” of \$64 million, instead valuing only the claims paid in a claims-made settlement). The notion that VWGoA could somehow confer a \$23 million benefit on the settlement class without paying a penny to the 22,000 members of the settlement class who did not claim to have experienced a window regulator failure is fantasy, because there is no one who realized this illusory “benefit”.

*Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), which the trial court cited in support of its perceived dichotomy between “actual amount paid out” and

“benefits conferred,” has no application to the facts of this case. In *Boeing*, a judgment after trial required defendant to pay, irrevocably, a fixed sum against which class members submitted claims. 444 U.S. at 475-76. The district court awarded Class Counsel a percent of the fund as a whole, including the unclaimed portion, as a reasonable attorney’s fee. *Id.* at 477. The sole issue before the Supreme Court was whether a reasonable attorney’s fee could be calculated from the fund as a whole or only from the claimed portion of the fund. *Id.*

In language which the trial court failed to mention in its order, the Supreme Court in *Boeing* specifically distinguished cases such as this one. **“Nothing in the court’s order made Boeing’s liability for [the judgment] amount contingent upon the presentation of individual claims.”** 444 U.S. at 479 n.5. (Emphasis added.) Here, VWGoA’s purely monetary obligation under the settlement is entirely and exclusively “contingent upon the presentation of individual claims,” *id.*, so that the “potential claims value” of the settlement and the defendant’s liability were one and the same number. In the terminology of the decisions below, the “benefit conferred” on the settlement class exactly equals “the actual amount paid out” – no more and no less. *Boeing*, therefore, has no application to this case, which is governed by *O’Brien*, and, at the United States Supreme Court level, *Hensley* and its

progeny. *See also Waters v. International Precious Metals Corp.*, 190 F.3d 1291, 1295-96 (11<sup>th</sup> Cir. 1999) (noting differences between settlement types).

*Strong v. BellSouth* exemplifies the approach taken by courts evaluating claims-made settlements, such as this one, and echoes the distinction drawn in *Boeing* between such settlements and true common fund judgments. *Strong* involved consolidated consumer antitrust class actions in Louisiana, Mississippi, Alabama, and Tennessee. As in this case, the settlement agreement in *Strong* did not create a judgment fund. However, unlike this case, the defendants agreed to a “clear sailing” provision under which they would not challenge an award of up to \$6 million in attorney’s fees (\$1.5 million in each jurisdiction). *Strong*, 137 F.3d at 847. Plaintiffs’ counsel valued the benefit to the class at \$64 million by assuming that every class member would be eligible for and claim the relief offered in the settlement. *Id.*

Each jurisdiction except for Louisiana rubber-stamped class counsel’s requested fees and awarded \$4.5 million of the total agreed \$6 million. *Id.* The Louisiana court, however, even though the fee application was unopposed under the “clear sailing” provision, refused to follow suit with the last \$1.5 million. Instead, as the trial court did in this case, the Louisiana court deferred ruling on fees until it received information as to the value of the claims class members actually submitted. However, when that amount proved to be only

\$1.72 million, as opposed to the \$64 million asserted by plaintiffs' counsel, the district court in *Strong* stated:

Counsel would ask this court to believe that the benefits to the class in this case exceeded \$64 million. . . . Now that the settlement claim forms have been returned by the class members, it is clear that the \$64 million figure is a phantom. . . . In fact, the value of the actual credit requests submitted was \$1,718,594.40. . . . **A request for \$6 million in attorneys' fees where counsel has provided no more than \$2 million in benefits to the class is astonishing.** It is a sad day when lawyers transmogrify from counselors into grifters. Suffice it to say that we find the request unreasonable.... [W]e find that **the requested fees and costs are grossly disproportionate to the benefits to the class.** We accordingly conclude that no additional fees and costs are merited.

*Strong*, 173 F.R.D. at 172-73 (emphasis added).

The U.S. Court of Appeals for the Fifth Circuit affirmed. *Strong*, 137 F.3d at 853. The appellate court distinguished *Boeing Co. v. Van Gemert* because (1) *Boeing* involved a true common fund; (2) the judgment in *Boeing* required the defendant to deposit the entire amount of the judgment into an account, regardless of the claims made; and (3) each member had an "undisputed and

mathematically ascertainable claim to part of [the] lump-sum judgment,” and could obtain their share merely by proving their claim against the fund. *Id.* at 851-53. In contrast, as in this case, the settlement agreement in *Strong* did not establish any common fund and “neither established nor even estimated [defendant’s] total liability.” *Id.*

The Fifth Circuit in *Strong* approved the district court’s finding that the \$64 million estimated value of the potential benefit to the class was a “phantom” and that class counsel’s valuation was “illusory.” *Id.* And it found that the district court properly compared the requested fee to the value of the actual claims made, not the potential value to the class, and it did not abuse its discretion in declining to award plaintiffs’ requested \$1.5 million in fees. *Id.* See also *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375,379 (D.Mass. 1979) (“**[T]he proportionality of the fee to the relief actually accruing to the class** is an equally important consideration in assessing the reasonableness of the fee award.”) (Emphasis added)

As in *Strong*, this is a pure claims-made settlement that “neither established nor even estimated [defendant’s] total liability.” 137 F.3d at 853. Here, the trial court appropriately deferred awarding a fee, in order to assess the true value of the benefit obtained for the class. Despite having done so, the trial court improperly gave its imprimatur to pure speculation in Class

Counsel's exaggerated estimate of the value of the potential benefit to the class. Despite the fact that the potential benefit in this claims made settlement necessarily equals the actual benefit conferred of \$125,261, the court, on the basis of no competent evidence, erroneously found a "potential benefit" of approximately 183 times the actual amount paid out.

Even in common fund situations, courts often look to actual claims made when determining a reasonable fee. For example, in *Wise v. Popoff*, the court performed a percentage-of-fund cross-check on the lodestar fee award in a common fund case. 835 F. Supp. at 981-82. The *Wise* court declined to compare the percentage of the fee awarded to the entire common fund, \$2.45 million, *id.* at 982, finding that a "more reasonable" fee was awarded when cross-checking a percentage of class members' actual recovery against the actual claims filed, which totaled \$479,624.31. *Id.* at 980. The *Wise* court refused to countenance a fee which would "tower almost 169% over the [actual] financial 'benefit' to the class," *id.* at 982, and ultimately awarded \$288,986.00, or approximately 45% of the actual benefits recovered for class members. In *Wise* terms, the Court of Appeals' fee award here "towers [2,470%] over the financial 'benefit' conferred on the class." Even though "discretion" may be the watchword in attorney fee jurisprudence, what occurred below is, as a matter of law, "against the logic of the circumstances

and so arbitrary and unreasonable as to shock one's sense of justice." (Op. at 11, citing *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 267 (Mo. App. E.D. 2011)).

The reasoning of the Fifth Circuit in *Strong v. BellSouth Communications* is fully applicable here. The value of the results obtained for the class equals the value of the claims made, not the speculative and "illusory" value adopted by the trial court. *See Strong*, 137 F.3d at 853.

The common fund doctrine and its framework for determining a reasonable fee award as a percentage of the whole fund does not apply here, where the parties' settlement agreement established a pure claims-made settlement without agreement on the value of the benefit obtained. *See Strong*, 137 F.3d at 853. In any event, viewing this settlement *arguendo* as a "constructive common fund," nothing in this or any other case would allow Class Counsel to receive over 98% of the total amount paid by the defendant in class relief and fees.

**Second:** during the course of the trial court's three-day fee hearing, Plaintiffs introduced no competent evidence that could support a finding of \$23 million of "potential benefit."

Here, the trial court, like other courts confronted with a similar fee issue, had appropriately deferred the fee hearing in order to receive evidence

and consider the value of the actual claims made. See, e.g., *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997)(staging fee award “to make sure the fee awarded is appropriate to the **value actually received** by the class members”)(emphasis added); *Strong v. BellSouth Telecommunications, Inc.*, 173 F.R.D. 167, 172-73 (W.D. La. 1997), *aff’d*, 137 F.3d 844, 853 (5<sup>th</sup> Cir. 1998); *Wise v. Popoff*, 835 F. Supp. 977, 981-82 (E.D. Mich. 1993); *Voegel v. Ackerman*, 67 F.R.D. 432, 436-37 (S.D.N.Y. 1975). But here, the trial court parted company with other courts in giving no weight to the established fact that a relatively small number of claimants - well below 1% of the settlement class - would collect a modest amount of money (\$125,261). This makes no sense.

Even if, *arguendo*, it were relevant for a trial court to attempt to ascertain “potential recovery” in a pure “claims made” settlement, any such determination must be based on competent evidence, not counsel’s self-serving claims. Here, the trial court valued the results obtained using Class Counsel’s inadmissible estimate of the “potential” benefits “available” to the class. This valuation is improper because it is not supported by any term of the Settlement Agreement, which makes nothing “available” to anyone who does not file a claim, nor by competent evidence. See *Strong*, 137 F.3d at 853; *Hoffman, v. Maplewood Baptist Church*, 409 S.W.2d 247, 252 (Mo.App. 1966),

and cases cited therein; *similarly, see Haley v. Horwitz*, 290 S.W.2d 414, 418 (Mo.App. 1956). *See also Realty Resources, Inc. v. True Docugraphics, Inc.*, 312 S.W.3d 393, 401 (Mo. App. E.D. 2010) (an appellate court “cannot affirm an award of attorney’s fees on appeal unless it is supported by substantial evidence”). Indeed, here the trial court’s valuation contradicts the actual evidence of the class recovery following the receipt of all claims.

The only evidence the trial court could have relied upon, in arriving at the \$23 million “potential benefit” figure, was the erroneously admitted “testimony” of Plaintiffs’ own counsel, as to what he assured the court, under oath, that his non-appearing witness might have said if called to testify. The circuit court, over objection, admitted and credited this “testimony.” The Court of Appeals simply adopted this \$23 million figure without discussion, and failed to address VWGoA’s appeal point that the circuit court had impermissibly relied on incompetent testimony. *See Hoffman*, 409 S.W.2d at 252, and cases cited therein; *see also Haley v. Horwitz*, 290 S.W.2d at 418.

Here, the only competent evidence of record was unrebutted first-hand testimony of VWGoA’s witness, based on his extensive experience at General Motors overseeing hundreds of recall and service campaigns, who concluded the response here to the classwide “census” embodied in the well-incentivized claims procedure closely approached the potential value of all available

claims. This witness's testimony was entirely consistent with VWGoA's own estimate of potential claims under the settlement, based on data available to both sides, which was shared with plaintiffs a year before the case settled. That data showed that the maximum exposure to reimbursement claims under what would become the settlement terms was in the vicinity of \$230,000. Confirming the undisputed fairness of the settlement, the actual payout, \$125,261, was 54% of VWGoA's estimate of potential claims.

In its opinion (at 12), the Court of Appeals cited *In re TJX Cos. Retail Sec. Breach Litigation*, 584 F.Supp.2d 395, 404 (D. Mass. 2008), where the court observed that "it is not unusual for only 10 or 15% of the class members to bother filing claims," and where class members are required to provide proof of their claim, "response rates are often very small." This raises two important points. First, even on the hypothetical assumption that \$125,261 were to represent just 10% of the eligible claims, the "potential value" of all claims would then only be \$1,252,610 – casting grave doubt on the \$23 million *ipse dixit* proffered by Plaintiffs' counsel and accepted over objection by both lower courts. Second, though a 10% claim rate might be typical of settlements with very modest individual payouts, coupons tied to future purchases, or onerous claim requirements, that low a claim rate has no proper application here, given the absence of procedural hurdles or onerous proof

requirements in the claims process. Mr. Lange's testimony was conclusive on this point.

Here, the average payout to the 130 claiming class members who actually experienced a window regulator failure was close to \$1,000. It is illogical to presume that 99.5% of persons who had such an experience and expense would simply ignore the chance to get their money back, when they can do so based only on a sworn statement. Indeed, in a recent automotive consumer class action – in which Class Counsel in this case represented the class – individual claims had a similar average value (\$1,181), and 41% of potentially eligible class members (1,200 out of 2,900) filed claims. *Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1167 n.2 and 1170-71 (C.D. Cal. 2010). In this case, if the claims actually made constituted 41% of all potential claims, this would yield a maximum “potential claims” value of approximately \$305,000 – again exposing Plaintiffs’ \$23 million “potential value” as mere fantasy and once again vindicating VWGoA’s fully disclosed \$230,000 estimate of actual maximum exposure. In short, no calculation based on competent evidence in the record can even remotely approach the illusory \$23,000,000 “potential value” inadmissibly alleged by Class Counsel and uncritically accepted by the trial court and Court of Appeals.

Thus, even if the “potential” claims can appropriately be taken into account in valuing a “claims made” settlement, there is no competent evidence in this case to support the claimed \$23 million “potential benefit” adopted by the trial court. Class Counsel’s testimony as to the unclaimed “benefit conferred” on the class was without foundation in either first-hand knowledge or claimed expertise, as the trial court expressly recognized. It was thus entitled to no more weight than a hypothetical opening statement, concerning what the attorney hoped he would have elicited from a witness, who he then failed to call.

Such lawyer statements, made without any evidentiary or expert foundation whatever, are not evidence of anything, as jurors must be instructed. MAI (Missouri Approved Jury Instructions) 2.01(2) (an “... opening statement [ ] by the lawyers as to what they expect the evidence to be ... is not to be considered as proof of a fact.”) Placing the attorney on the witness stand and swearing him cannot transform inadmissible statements into evidence. The two lower courts’ acceptance of this “testimony” was plain error. Absent this inadmissible evidence, the record provides no support for the \$23 million “potential benefit” finding underlying the fee award in this case.

**Third:** The Court of Appeals correctly held that the “potential benefit” figure proffered by plaintiffs and adopted by the trial court could not support a fee multiplier; but erred in inconsistently using that very figure to support an award of plaintiffs’ full lodestar attorney’s fee. The Court of Appeals (Op. at 9-15) applied a long line of U.S. Supreme Court and Missouri precedent, and properly found the circuit court erred in applying a 2.0 multiplier (worth more than \$3 million) to the lodestar. The opinion cited *Hensley, supra*; *Pennsylvania v. Delaware Valley Citizens’ Council*, 478 U.S. 546, 565 (1986); *Perdue v. Kenny A*, 130 S.Ct. 1662 (2010); *Trout*, 269 S.W.3d at 488; and *Zweig v. Metropolitan St. Louis Sewer Dist.*, - S.W.3d -, 2012 WL 1033304, \*7 (Mo. App. E.D. March 27, 2012) (transfer applic. pending).

On this point, the Court of Appeals noted that “Federal and State courts across the country are divided on the issue of whether the results obtained by class counsel in a claims made settlement should be viewed, as the circuit court did, by the potential benefit to the class, or the actual results obtained for the class after the claims process” (Op. at 12) The court agreed with VWGoA that “in this case the ‘potential benefit’ to the class . . . is not the measure of the degree of success obtained” (Op. at 11) noting that “[o]therwise, the award effectively rewards class counsel in a manner almost arbitrary to the relief afforded to the class.” (Op. at 13) The court

appropriately chose actual benefits recovered as opposed to claimed “potential” value, observing that, “[a]s many courts have recognized, to value a ‘claims made’ settlement at a one-hundred-percent return rate is largely illusory.” (Op. at 11-12) However, just two pages further in its opinion, the court held that it could not ignore this “potential benefit” in allowing an award of counsel’s full lodestar fees. (Op. at 14)

This inherent contradiction must be corrected. “Potential” recovery, which the Court of Appeals held was “not the measure of the degree of success” in awarding a multiplier, cannot simultaneously be supportive of a lodestar fee 24.6 times the actual relief afforded class members. Whether phrased as the value of the “result obtained,” *Jones v. GN Netcom, Inc.*, 654 F.3d at 942, “the degree of success,” *Hensley v. Eckerhart*, 461 U.S. at 436, or, in the court’s words, the “relief afforded to the class” (Op. at 11), there can be only one value for a “money-only” claims made settlement, namely the relief actually recovered, which equals the amount the defendant paid to the class. Since this amount was known to the penny at the fee hearing, as the claims period had closed, there was in fact no “potential” for any recovery beyond that, once the trial court rendered its award.

The Court of Appeals’ reliance on the trial court’s wholly unsupported “potential value” figure was error, and in light of the very limited results

actually obtained by the plaintiff class, and plaintiffs' failure to prevail on 98% of their original nationwide class claim, the fee awarded by the Court of Appeals should be appropriately reduced to a figure "bearing some relation" to the \$125,621 recovery.

**III. The trial court abused its discretion and erred in doubling Class Counsel's lodestar fee, resulting in a fee award of \$6,174,000, because there are no rare or exceptional circumstances, as required by applicable law, to justify a multiplier resulting in fees of \$1,300 per hour for lead counsel, \$750 for an associate, and \$392 for paralegals, in that this is a straightforward consumer action involving an alleged product defect, in which 98% of the nationwide class sought in Plaintiffs' Petition was eliminated when nationwide certification was denied, and the class recovered only \$125,621; rather, Class Counsel's lodestar fee should have been reduced and remitted, based on plaintiffs' limited success in this action, and the Court of Appeals erred in failing to order such a reduction.**

In its decision below, the Court of Appeals correctly applied the law in reversing the trial court's award of a fee multiplier.

In the fee hearing, Class Counsel presented to the trial court (and received approval for) hourly billing rates of \$650 for lead counsel; \$450 for

the second partner on the case; \$375 for its lead associate; and \$196 for its paralegals. By applying a 2.0 multiplier to these rates, the trial court would compensate lead counsel at a rate of \$1,300 an hour, the second partner \$900 per hour, the lead associate at \$750, and paralegals at \$392. (See LF XXXI 5893.) Such rates are plainly excessive, and entirely unwarranted. As shown below, the record does not support an award of Class Counsel's lodestar, much less any multiplier. Class Counsel's hourly rates and the number of hours they spent on this matter were not contested by VWGoA. However, the lodestar must be reduced because of (1) the very modest result obtained for class members (\$125,641); (2) the complete failure of 98% of plaintiffs' case, when certification of a nationwide class under Michigan warranty law was denied; and (3) compelling case law requiring that in cases such as this one, an appropriate reduction is required, because where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount ... even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *E.g., Hensley*, 461 U.S. at 436.

This Court has recognized that "[c]ases interpreting Rule 23, Rule 52.08 and § 407.025 are essentially interchangeable." *Dale v. DaimlerChrysler*, 204 S.W.3d 151, 161 (Mo. Ct. App. 2006). Also, the MMPA statute specifically

“express[es] a preference for Rule 23 over Rule 52.08 if a conflict occurs.”<sup>4</sup> See § 407.025.3; *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 712 (Mo. App. 2009); *Dale*, 204 S.W.3d at 161; *Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 81 (Mo.App. 2011). Accordingly, Federal Rule 23 cases are “informative” in cases brought under Missouri Rule 52.08). *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 858 n.2 (Mo. banc. 2008). Indeed here, the trial court looked to federal law, citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974) in support of its award. While it was appropriate for the trial court to give weight to federal law in determining fees, as discussed below, it was not appropriate for the court to overlook the fact that the U.S. Supreme Court has substantially refined the *Johnson* method of analysis since 1974.

There is a substantial body of case law decided under Rule 23, involving payment of attorney’s fees to successful class action plaintiffs’ counsel, and in particular, examining appropriate lodestar and multiplier amounts. *Perdue v. Kenny A. ex rel. Winn*, \_\_ U.S. \_\_, 130 S.Ct. 1662 (2010), is the most recent in a

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<sup>4</sup> “An action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri Rule of Civil Procedure 52.08 to the extent such state rule is not inconsistent with the federal rule....” R.S.Mo. § 407.025.3.

line of cases spanning three decades, which goes directly back to *Hensley v. Eckerhart*, a case that has become the bedrock on which Missouri fee jurisprudence rests. In *Perdue*, a civil rights case decided under 42 U.S.C. § 1988, the Supreme Court reviewed varying approaches to payment of a reasonable attorney's fee in a class action, and, culminating a series of cases starting with *Hensley* itself, 461 U.S. at 434 n.9, which recognized one *Johnson* factor after another as subsumed in the lodestar, stepped away from *Johnson*, because it "gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." 130 S.Ct. at 1671-72, quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986).

Rather, the Supreme Court in *Perdue*, 130 S.Ct. at 1672-73, reviewed its long line of cases dating back to *Hensley*<sup>5</sup>, and concluded that the Court's prior decisions regarding fee-shifting statutes have established "six important

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<sup>5</sup> These include *Hensley*, *supra*; *Pennsylvania v. Delaware Valley Citizens' Counsel*, *supra*; *Blum v. Stenson*, 465 U.S. 886 (1984); *Burlington v. Dague*, 505 U.S. 557 (1992); and *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002).

rules,” which explain clearly why enhancements to lodestar amounts are rarely justified:

First, a “reasonable” fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case... [it] is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys. Section 1988’s aim is to enforce the covered civil rights statutes, not to provide a form of economic relief to improve the financial lot of attorneys.

Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. Indeed, we have said that the presumption is a “strong” one.”

Third, although we have never sustained an enhancement of a lodestar amount for performance ... enhancements may be awarded in ‘rare’ and ‘exceptional’ circumstances.

Fourth, we have noted that “the lodestar figure includes most, if not all, of the relevant factors constituting a ‘reasonable attorney’s fee’, and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors ‘presumably [are] fully

reflected in the number of billable hours recorded by counsel'. We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate."

Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant.

Finally, a fee applicant seeking an enhancement must produce "specific evidence" that supports the award. (An enhancement must be based on "evidence that enhancement was necessary to provide fair and reasonable compensation"). [Internal citations omitted.]

As the Court of Appeals found, none of these well-established factors summarized by the Supreme Court in *Perdue* remotely justifies any multiplier in this case. This case involves no "rare" or "exceptional" circumstances that would justify the application of a multiplier. To the contrary, this is one of those "exceptional" cases in which the paltry "result obtained" requires a substantial downward adjustment in the lodestar. See *Hensley*, 461 U.S. at 436, 440; *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 942 (9th Cir. 2011)

Further, the claims experience in this case suggests strongly that the plaintiffs' claim in this litigation of a pervasive and prevalent "defect" inherent in all class vehicle window regulators was less than "meritorious."

Specifically, through a mailing and repeat mailing process which ultimately reached over 20,000 out of approximately 22,300 addressees, the claims process took a complete census of everyone who was ever registered as an owner or lessee of a class vehicle. Anyone who had replaced a window regulator for any reason other than externally caused damage was invited and encouraged to claim full reimbursement plus \$75 per workshop visit, payable on no more than a sworn statement.<sup>6</sup> With every incentive to claim and no barrier to recovery, this census turned up exactly 130 owners who validly claimed such a failure at any time during the ten year service life of their cars. On these facts, the policy of attracting competent counsel to "meritorious" cases is plainly inapplicable. (cf. Op. at 14) The policy which must control on these facts is the judiciary's steadfast refusal to bestow "windfalls" or

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<sup>6</sup> In Class Counsel's words, "The reimbursement payments offered under the terms of the settlement are the type of relief Plaintiffs hoped to obtain at trial, assuming they prevailed." LF XXXIV 6217.

“economic relief” on lawyers for insignificant “achievements.” *E.g., Farrar v. Hobby*, 506 U.S. at 115; *City of Riverside v. Rivera*, 477 U.S. at 580.

In addition to their modest recovery on what remained of their case by the time of impending trial, Class Counsel registered a complete lack of success on by far the most substantial part of their case – a proposed nationwide class that would have been at least 80 times the size of the certified Missouri class. “*Hensley* permits the court to award fees for losing arguments in support of prevailing claims, but not for losing claims.” *Pressley v. Haeger*, 977 F.2d 295, 298 (7th Cir. 1992) (citing *Hensley*, 461 U.S. at 435).

Where there is only limited success on claims based on a common core of facts or related legal theories, the trial court “should focus on the significance of the overall relief obtained.” *Trout*, 269 S.W.3d at 488 (quoting *Hensley*, 461 U.S. at 435) (approving trial court’s 25% reduction of requested fee award to reflect lack of success on all claims). Similarly, see *Knopke*, 837 S.W.2d at 922-23, in which this Court reversed a portion of the trial court’s judgment in favor of the plaintiffs, and held that, “The amount of the award to the [plaintiff] is of course an item to be taken into account in the award of attorneys’ fees [citing *O’Brien*], and the attorneys fee award must be reduced as the amount of the judgment is reduced, although not necessarily ratably.” Thus, this Court ordered a 25% reduction in the award of fees to plaintiffs’ counsel, based on

their failure to prevail on some of their claims. And, as discussed above, in *Gilliland v. Missouri Athletic Club*, 273 S.W.3d at 523-24, where the plaintiff prevailed on a tort claim alleging constructive discharge, but his claims under the MHRA alleging sex discrimination, race discrimination, and sexual harassment failed, this Court upheld an attorney fee award of \$22,000, where the damages awarded plaintiff totalled \$60,000, and plaintiff claimed actual attorney fees expended in the amount of \$170,149.

Class Counsel here failed entirely to succeed on the claim with the broadest scope and is not entitled to fees charged to pursue the breach of implied warranties claim, for which they sought certification of a nationwide class. *Trout*, 269 S.W.3d at 488. The trial court abused its discretion, and the Court of Appeals erred by failing to reduce the lodestar amount accordingly. *See Hensley*, 461 U.S. at 435; *Trout*, *supra*.

VWGoA submits that both the Western District Court of Appeals, in the decision below, and the Eastern District Court of Appeals in *Zweig v. Metropolitan St. Louis Sewer Dist.*, correctly concluded that the latest in the long line of U.S. Supreme Court fee-shifting cases – *Perdue* – should, like *Hensley*, be applied by the courts of this state.

Class Counsel argued below that because *Perdue* and *Hensley* were 42 U.S.C. § 1988 cases, they should not apply to this case, which involved MMPA

claims. This position is directly contrary to law. In *Hensley* itself, which was decided under 42 U.S.C. § 1988, the U.S. Supreme Court made it clear that its holding applied to all federal fee-shifting statutes:

As we noted in *Hanrahan v. Hampton*, 446 U.S. 754, 758 n. 4 (1980) ( per curiam), “[t]he provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Title II and VII of the Civil Rights Act of 1964... and § 402 of the Voting Rights Act Amendments of 1975....” The legislative history of § 1988 indicates that Congress intended that “the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.” .... **The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a “prevailing party.”**

461 U.S. at 433, n.7. (Emphasis added; internal citations omitted)

In subsequent cases, the U.S. Supreme Court has left no doubt that all federal fee-shifting statutes calling for an award of “reasonable” attorneys' fee should be construed uniformly. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); see also *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2 (1989).

The Missouri courts have repeatedly recognized *Hensley v. Eckerhart* as

the wellspring of governing principles in fee award decisions in cases of various types. See, e.g., *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989) (state odometer fraud statute); *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 523 (Mo. banc 2009) (Missouri Human Rights Act); *Mihlfeld & Associates, Inc. v. Bishop & Bishop, L.L.C.*, 295 S.W.3d 163, 175 (Mo.App. S.D. 2009) (non-compete agreement/ trade secrets); *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 879 (Mo.App. E.D. 2009) (Missouri Human Rights Act); *Melahn v. Otto*, 836 S.W.2d 525, 527-28 (Mo.App. W.D. 1992) (review of state Department of Insurance administrative proceedings).

*Perdue* is simply the latest in the line of cases developing and refining the principles first comprehensively laid down in *Hensley*. Accordingly, both federal and state courts have adopted and applied its teachings in numerous cases involving a wide variety of fee-shifting statutes. *Samuel-Bassett v. Kia Motors America, Inc.*, 34 A.3d 1, 49-57 (Pa. 2011) (Magnuson-Moss Warranty Improvement Act class action); *Braun v. Wal-Mart Stores*, 24 A.3d 875, 975, 976, 980 (Pa. Super. 2011)(Pa. Wage Payment and Collection Act); *Electrical Wholesalers, Inc. v. V.P. Elec., Inc.*, 33A.3d 828, 832-32 (Conn.App. 2012) (*Johnson* factors “out of favor” – citing *Perdue*); *Spooner v. EEN, Inc.*, 644 F.3d 62, 67 (1<sup>st</sup> Cir. 2011) (Copyright Act); *Millea v. Metro-North R. Co.*, 658 F.3d 154, 166-67 (2<sup>nd</sup> Cir. 2011) (Family Medical Leave Act); *McClain v. Lufkin*

*Industries, Inc.*, 649 F.3d 374, 384 (5<sup>th</sup> Cir. 2011), *cert. denied* 132 S.Ct. 589 (Title VII class action); *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 641-43, (7<sup>th</sup> Cir. 2011) (Title VII).

The Court of Appeals decisions below and in *Zweig* thus properly concluded that *Perdue*, like *Hensley*, should be applied in cases that arise under Missouri law, and not solely to cases brought under 42 U.S.C. § 1988.

But even if, *arguendo*, this Court were to decline to formally adopt *Perdue*, the answer to whether a multiplier should apply is exactly the same: it should not.

This Court's most recent pre-*Perdue* discussion of factors relevant to an award of statutorily authorized fees came in, *Gilliland*, 273 S.W.3d at 523, which endorsed a seven factor test utilized in *Williams v. Finance Plaza*, 78 S.W.3d at 184, 187: (1) the rates customarily charged by the attorneys involved in the case and by other attorneys in the community for similar services; (2) the number of hours reasonably expended on the litigation; (3) the nature and character of the services rendered; (4) the degree of professional ability required; (5) the nature and importance of the subject matter; (6) the amount involved or the result obtained; and (7) the vigor of the opposition. None of these factors remotely justify a fee award nearly 25 times the result obtained in a case which only involved money.

Factor 1: In this case, Class Counsel was awarded hourly rates which almost certainly are among the highest in the community for similar services: \$650 for lead counsel; \$450 for the second partner on the case; \$375 for its lead associate; and \$196 for its paralegals. To multiply those rates would result in astronomical hourly rates. Factors 2 and 7: While the number of hours counsel spent on the case is not in dispute, a case in which plaintiffs lost their bid for a nationwide class and ultimately obtained a very modest recovery for a small number of people, does not justify five years of litigation, but rather suggests that Class Counsel misevaluated and over-valued their case. While VWGoA had tried more than once to show plaintiffs that there would be few claims in this matter, and that its maximum total reimbursement exposure would not exceed \$230,000 (Def. Exh. #112, at p. 3.), Class Counsel apparently disagreed, and forged ahead. They should not be rewarded for their erroneous evaluation.

Factors 3 and 4: As might be expected of a firm of Class Counsel's experience and reputation in class action litigation, its services were performed well and professionally, albeit in a quest out of all proportion to the result obtained.

Factor 5: And while the Court of Appeals, like other courts before it, took note of the MMPA's public policy objectives, here the fact remains that

the actual results obtained involved nothing particular or unique to the MMPA, but simply involved compensation for a small number of private auto repair claims.

Factor 6: As discussed above, the “amount involved” and “result obtained” by class counsel involved 130 persons who were paid a total class recovery of \$125,621 – a result repeatedly telegraphed to them by defense counsel. The settlement, though “the type of relief Plaintiffs’ hoped to obtain at trial, assuming they prevailed” (LF XXXIV 6217), provided no injunctive relief, no punitive damages, no maintenance or other information disclosures, no product redesign - in short, no action by VWGoA other than to pay claimants for any window problems they experienced. And all this after a nationwide class was disallowed, reducing the class certified to 1/80<sup>th</sup> the size of the class originally sought by Plaintiffs.

Thus, under the factors listed in *Gilliland*, the result should tally with that in *Gilliland*, where plaintiff obtained only partial success, failed to prevail on some of his claims, and notwithstanding his request for a fee exceeding \$170,000, he received only a \$22,000 fee award. Here, similarly, a major reduction is required.

**IV. The trial court abused its discretion and erred in awarding Class Counsel 98% of the total amount the trial court ordered VWGoA to pay, and the Court of Appeals erred in awarding Class Counsel 96% of the total amount, because such a fee award offends sound public policy and threatens to cast the court system in an unfavorable light, in that it disproportionately decouples class counsel's financial incentives from those of the class, undermines the underlying purposes of class actions by encouraging class counsel and defendants to settle lawsuits in a manner more favorable to counsel than to class members, and encourages meritless litigation by rewarding failure or, as here, limited success.**

Writing separately in *International Precious Metals v. Waters*, Justice O'Connor cogently surveyed some of the policy implications of awarding "reasonable attorney fees" in amounts without regard to the actual benefits recovered by the class, even where the settlement establishes a common fund:

The approval of attorney's fees absent any such inquiry could have several troubling consequences. Arrangements such as that at issue here decouple Class Counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially

undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing Class Counsel to settle lawsuits in a manner detrimental to the class. And they could encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be minimal.

530 U.S. at 1223. There, a settlement agreement established a \$40 million reversionary common fund. *Id.* The parties agreed that class counsel could seek one-third of the total fund, for an award of \$13.3 million. *Id.* However, distributions to the class totaled only \$6.49 million, resulting in an attorney's fee more than double the class' actual recovery. *Id.* Justice O'Connor believed this "extraordinary" fee award merited Supreme Court scrutiny and stated, "the importance of the issue counsels in favor of granting review in an appropriate case." *Id.*<sup>7</sup>

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<sup>7</sup> Justice O'Connor concurred in denying certiorari only because the defendant had waived any challenge to the reasonableness of the fee by agreeing to give "clear sailing" to an award of 1/3 of the entire pre-reversion fund. *Id.*

The only case in which the U.S. Supreme Court has allowed a statutory fee award to exceed a monetary recovery further exemplifies the operative policies which militate against an award like the one now before this Court. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Court allowed an attorney's fee award of 7.36 times the damages award to remain standing under circumstances bearing no resemblance to the situation at bar. Plaintiffs in *Rivera* sued a local police department for violations of various federal civil and constitutional rights, and various state laws, alleging egregious willful misconduct in which officers of the city's police force, acting without a warrant, broke up a party by using tear gas and unnecessary physical force, and arresting many of the guests without cause.

At trial, the *Rivera* jury returned 37 individual verdicts against the defendants, finding 11 violations of 42 U.S.C. § 1983, four instances of false arrest and imprisonment, and 22 instances of negligence. *Id.* at 564. In the Supreme Court, a four Justice plurality sustaining a fee award of \$245,456.25, where the damage award totaled \$33,500. The plurality cited the gross violations of plaintiffs' civil and constitutional rights as factors that weighed in favor of allowing the fee to exceed the damages awarded. *Id.* at 571, 574-75. One Justice concurred "despite serious doubts as to the fairness of the fees awarded in this case." *Id.* at 586. Four dissenting Justices concluded that "the

Court's affirmance of the fee award emasculates the principles laid down in *Hensley*, and turns [28 U.S.C.] § 1988 into a relief Act for lawyers." *Id.* at 588.

Obviously, in our case, there is no finding of liability, and no allegation or issue remotely akin to the egregious Constitutional violations, and public policy concerns present in *Rivera*. But even with those non-monetary factors directly affecting the general public as a whole, the *Rivera* Court affirmed, by the narrowest of margins, an award only seven times the damage award. This is a far cry from the Court of Appeals' fee award of nearly 25 times the total class recovery (let alone the trial court's doubling of that amount) under a settlement with no liability finding, no non-monetary relief and no public policy implications, under *Hensley* or the United States Constitution.

None of the policy rationales listed by the Court of Appeals in support of leaving in place a 25-to-1 ratio of fees to results achieved passes muster on the record in this case. As noted, "the underlying concern of incentivizing attorneys to take on meritorious class actions" (Op. at 14) does not require that losers, or in this case *de minimis* "winners" of only a tiny slice of the litigation pie, must be paid as if they were winners. Indeed, as the evidence at the hearing showed, Class Counsel's own business model and their success in pursuing it, as described on their website, reflects their willingness to take such risks, to say nothing of an enviable overall track record in selecting cases:

Over the last ten years our trial lawyers, groomed at large, nationally-prominent firms - have . . . recovered more than \$400 million in relief for individuals through aggressive litigation. . . .

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. . . ***we use results-based contingency fee billing, not hourly billing***, to give our clients the flexibility to pursue legal action even when that action wouldn't ordinarily be cost effective. (Def. Ex. 107)(Emphasis added)

Even a standard contingent share of that \$400 million recovery is more than enough to compensate Class Counsel well, regardless of the outcome in this or any particular case. More broadly, a fee award properly commensurate with the actual result in this one case will not dissuade Class Counsel or their brethren from taking on promising cases. Indeed, it will directly foster the policy of attracting counsel to truly “meritorious” claims by incentivizing Class Counsel and their peers to weed out cases such as this one, which do not justify a major effort and should not be compensated as if they did. The plaintiffs’ bar is more than capable of arbitraging winners and losers to their own immediate and to society’s ultimate advantage. There is no economic or policy justification for the judiciary to come to their rescue by awarding an extravagant fee in a case with modest results.

By the same token, fee awards out of all proportion to actual exposure would inflate the already substantial cost of years of successful defense of a product with no systemic defect. Why should VWGoA be saddled with an enormous fee award for exercising its right to defend itself and its products and ultimately demonstrating that this defense was warranted? If, perversely, it turns out to be cheaper for defendants to fight and win than to compromise and resolve litigation, no one – not the defendant, not the public, and not even plaintiffs’ attorneys – will benefit.

The courts below both appear to have accepted the concept that if a plaintiff can claim any “success” whatever, no matter how small, any efforts devoted to that outcome are compensable, even if spent in a largely unproductive quest. This notion runs counter to two of the fundamental principles espoused in *Hensley*. First, “hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.” 461 U.S. at 434. Second, “the range of possible success is vast. That the plaintiff is a ‘prevailing party’ therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.” *Id.* at 436. The approach effectively endorsed below, in which any outcome other than total loss of the case is to be treated as total victory, makes no sense. Neither Missouri nor any other jurisdiction has

espoused a policy of incentivizing litigation for its own sake untethered to actual recoveries.

The Court of Appeals also purported to justify its \$3 million payout for a recovery less than 1/25<sup>th</sup> that amount on the stated basis that “[i]f only the actual recovery were used, the attorney’s performance expended in obtaining the settlement might not be reflected in the fee award. Vigorous hours spent in litigation protracted by defense counsel might go uncompensated.” (Op. at 14) This rationale fails in general because it diametrically rejects the governing principle, reflected in *O’Brien*, and directly espoused in *Trout*, *Hensley* and numerous other cases, that the “result obtained” is ultimately the “most critical” factor in assessing a fee. E.g., *Hensley v. Eckerhart*, 461 U.S. at 436-37. Even if theoretically available, this consideration cannot be applied in this case, where the Court of Appeals itself noted that “there is no finding that this was either an exceptional or unanticipated delay.” (Op. at 10)

The notion that “the opportunity for recovery . . . is a benefit conferred even if a class member does not take advantage of it” (Op. at 14) stands in direct contradiction to the Court of Appeals’ own correctly reasoned rejection of this exact concept, which appears on the preceding page of its opinion:

Viewing the success of the suit by the potential recovery in such a claims-made settlement and assuming, as was done here, a one-

hundred-percent rate of return is inappropriate. As noted, trial court itself acknowledged the prediction that “only a tiny fraction of the class members will make a claim,” and it expected the amount recovered by class members to be “unlikely to exceed \$150, 000,” yet it tied the attorney’s fee award to the “potential benefit” of \$23 million. Generally, the class’s actual recovery should bear some relation to the fee award. Otherwise, the award effectively rewards class counsel in a manner almost arbitrary to the relief afforded to the class and provides little incentive for counsel to ensure the class obtains full relief. Tying the consideration of class counsel’s success to the actual recovery benefits the class action by “encourag[ing] more realistic settlement negotiations and agreements,” and giving class counsel “an incentive to . . . devise better notice programs, settlement terms, and claim procedures, all to the benefit of the consumers who have been harmed” and in whose names the suit was brought. *In re TJX Cos.*, 584 F. Supp. 2d at 406. (Op. at 13)

The Court of Appeals lastly invoked the underlying policy of the MMPA, as follows:

Finally, the benefit conferred by a successful MMPA class action is not solely the amount of recovery, but also the vindication by private

litigants of a public wrong. See *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 711 (Mo. App. W.D. 2009) (“The purpose of Missouri's Merchandising Practices Act is to preserve fundamental honesty, fair play and right dealings in public transactions.”)(Op. at 14)

Here, however, the settlement resulted in the payment of a small sum of money to a small number of people – and nothing else. There was never any realistic prospect of achieving non-monetary MMPA relief, as any VWGoA advertising, marketing or other “merchandising practices” with respect to the 1993-1999 model year vehicles in the class had ended more than six years prior to the filing of this case. Class Counsel’s own characterization of the settlement terms below as “the type of relief Plaintiffs hoped to obtain at trial, assuming they prevailed” (LF XXXIV 6217) confirms that there was no “public wrong” aspect of their MMPA claim.

Rejecting the fee approach espoused below will also serve judicial efficiency, and prevent the misallocation of substantial court time, as exemplified by the three day hearing below devoted largely to Class Counsel’s lengthy justification for the hours they expended on this case – an unnecessary use of judicial resources in light of the modest recovery secured for the class:

. . . when a plaintiff's victory is purely technical or *de minimis*, a district court need not go through the usual complexities involved in calculating attorney's fees. . . . As a matter of common sense and sound judicial administration, ***it would be wasteful indeed to require that courts laboriously and mechanically go through those steps when the de minimis nature of the victory makes the proper fee immediately obvious.*** Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to “award low fees or no fees” at all. *Ante*, at 115.

*Farrar v. Hobby*, 506 U.S. at 116-118 (O'Connor, J., concurring) (Emphasis added)

The outcome below also directly undermines the important policy interest in encouraging settlements. *See J.A. Tobin Const. Co. v. State Highway Comm'n of Missouri*, 697 S.W.2d 183, 186 (Mo. Ct. App. 1985) (noting public policy). Where fee awards are divorced from any relation to real world outcomes, counsel on both sides lack incentive to reach a reasonable settlement prior to protracted litigation; the prospect of a fee award that dwarfs the relief obtained would discourage timely settlement. *See, e.g., Goldberger v. Integrated Res.*, 209 F.3d 43, 48 (2d Cir. 2000); *Espino v. Besteiro*, 708 F.2d 1002, 1010 (5th Cir. 1983). Plaintiff's counsel would have a reduced

incentive to recommend settlement to their clients if they can expect to obtain a fee award that grossly exceeds the recovery. *See id.* Defendants would have less incentive to consider and accept a reasonable settlement demand if courts force them to pay attorney's fees bearing no relation to the damages paid in settlement.

The indefensible nature of the outcome below can also be appreciated by a hypothetical: Assume that the parties had crafted an agreement which achieved exactly the result endorsed by the Court of Appeals, in the form of a common fund of approximately \$3.2 million for class relief and fees – of which 96% would go to the attorneys and 4% to the class. No court would consider approving such an unwholesome pact for even an instant. By the same token, no defensible notion of public policy supports the idea that a court can be allowed to impose unilaterally a result to which the parties could not be allowed to agree.

As noted above, in cases where the settlement does not provide for “money paid into escrow or any other account” and “neither establishe[s] nor even estimate[s] ... total liability”—courts “consider[] the actual claims awarded,” not some “phantom” or “illusory” “valu[ation] of the settlement.” *Strong*, 137 F.3d at 852-853.

In this case, VWGoA will pay class member claims that have been actually filed, totaling \$125,261 – no more, no less. The lower courts’ rationales for their excessive awards, based on hypothetical class members who will never appear, and “illusory” claims that will never be filed, would ensure a windfall to Class Counsel. A rule of law that countenances this outcome would encourage plaintiffs’ counsel to bring dubious class action suits, seeking percentage-of-fund fees based on “phantom” values of settlements that confer minimal practical benefits on class members.

Review of the award below ultimately calls into play one of the most fundamental policy concerns of the judiciary – the integrity of the courts, and of equal importance, the public’s perception of the integrity. As the United States Court of Appeals for the Second Circuit put it many years ago:

For the sake of their own integrity, the integrity of the legal profession and the integrity of Rule 23[Fed.R.Civ.P.], it is important that the courts should avoid awarding “windfall fees” and that they should likewise avoid every appearance of having done so.

*City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974). Accord, *Duhaime*, 989 F. Supp. at 379 (“[T]he proportionality of the fee to the relief actually accruing to the class is an equally important consideration in assessing the reasonableness of the fee award in the present case, because it is

that relationship that litigants in future cases will look to in structuring their own arrangements regarding attorneys' fees. Any fee approved by this Court 'is not only a matter of public record, it becomes part of the great body of our law'") (quoting *Codex Corp. v. Milgo Elec. Corp.*, 717 F.2d 622, 632 (1st Cir. 1983))

**V. The trial court erred and abused its discretion in awarding attorney's fees of 49 times the class recovery, and the Court of Appeals erred in awarding attorney's fees of 25 times the class recovery, because such an award violates VWGoA's rights under the Due Process clauses of the U.S. Constitution and the Missouri Constitution in that the attorney fee award is grossly disproportionate to the class relief obtained, arbitrary and not based on competent evidence.**

Due process protects against all arbitrary deprivations by the state of an individual's property, including the state's enforcement of a civil monetary award. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause, like its forebear in the Magna Carta, . . . was intended to secure the individual from the arbitrary exercise of the powers of the government.") (quotation omitted).

Although the U.S. Supreme Court in recent years has emphasized the special limits imposed upon the award of punitive damages, the Court has also

been clear that these specific limits derive from the limits that the Due Process Clause imposes on *all* types of monetary awards. As Justice Breyer has observed, the due process principles that rest at the core of the Court's punitive damages cases derive from the "constitutional concern, itself harkening back to the Magna Carta, [over] the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

The force of that principle does not begin and end with damages a State labels as "punitive." For example, the Supreme Court has made clear that due process places limits upon the award of statutory damages and fines. *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (stating that the Due Process Clause precludes state from imposing civil penalties wholly disproportionate to the offense); *Southwestern Tele. & Tele. Co. v. Danaher*, 238 U.S. 482, 491 (1915) ("In these circumstances to inflict upon the company penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law."); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (noting that Court can interfere with "judicial action of the States enforcing" civil penalties for unlawful acts if

the amount imposed is “so grossly excessive as to amount to a deprivation of property without due process of law”).

In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Supreme Court invalidated on notice grounds a state statute permitting juries to impose the “costs” of certain prosecutions on acquitted defendants. The Court reasoned that “[i]mplicit in [the] constitutional safeguard [of fair notice] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.” *Id.* at 403. Attorney fee awards that are wholly outside the range that a defendant could reasonably associate with the conduct at issue run afoul of this due process principle.

Similarly, an attorney’s fee award that is supposed to represent reasonable attorney compensation for representing a class must have a reasonable relationship to the results obtained. It cannot constitute an unbridled windfall far exceeding the bounds of reasonableness under the MMPA. The due process precepts at the heart of the U.S. Supreme Court’s decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408 (2003), provide analogous guideposts for placing due process limitations on what constitutes a “reasonable” attorney fee.

Here, the courts below based their respective awards on an illusory foundation. The so-called \$23 million potential benefit to the class ignored the fact that no such “potential benefit” was conferred or even mentioned in the settlement agreement, and was premised upon incompetent testimony. It was without evidentiary support and resulted in a grossly inflated estimate of the settlement value. Moreover, the unrefuted testimony of defense expert Robert Lange was ignored.

The Supreme Court in *State Farm* found a punitive damage award exceeding 10 times the amount of damages awarded would violate due process under the Fourteenth Amendment to the U.S. Constitution. Regarding punitive damage awards that greatly exceeded compensatory awards, the Supreme Court stated:

Our jurisprudence and the principles it has now established demonstrate ... that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*<sup>9</sup>, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. The

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<sup>9</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive.

*State Farm*, 538 U.S. at 425 (internal citations omitted).

Within a broad span of permissible outcomes, a review of attorney's fees compared to monetary relief obtained, like a review of punitive damages relative to compensatory damages, is a matter for the court's sound exercise of its judgment, within guidelines cited in cases such as *Hensley* and *O'Brien*, in ascertaining a fee's reasonableness. However, when the ratio of fees to class recovery enters the extreme realm shown on this record, the Constitutional constraints articulated in *State Farm* and *Gore* concerning the Due Process Clause of the Fourteenth Amendment and its protection against excessive or arbitrary punishments are at issue. *State Farm*, 538 U.S. at 416. The fee award below implicates the same fundamental due process interests.

As to punitive damages, the law of Missouri is in accord. In *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 850-851 (Mo. App. 2007), *cert. den.* 555 U.S. 824 (2008), the Court applied *State Farm v. Campbell*, and held that the disparity between the harm suffered and punitive damages award compelled reversal of Kelly's punitive damages award:

“In *Campbell*, the United States Supreme Court stated generally, ‘few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.’ *Campbell*, 538 U.S. at 424. Moreover, ‘an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.’ *Id.* . . . [T]he *Campbell* court reasoned, ‘[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goal of deterrence and retribution, than awards with ratios in [the] range of 500 to 1’. *Campbell*, 538 U.S. at 424. Further, we ‘must ensure the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.’ *Id.* at 426.”

When the ratio of claimed fees to results obtained vastly exceeds the Constitutionally permissible single-digit ratio, the Due Process constraints applied in *State Farm*, *Gore*, and *Kelly* apply. Under *Kelly*, the same due process protections that arise under the Fourteenth Amendment to the U.S.

Constitution, arise under Article I, Section 10 of the Missouri Constitution.

When instead of applying ascertainable, objective legal standards for what is “fair” and “reasonable”, a court invokes subjective, vague criteria that lead to grossly excessive fee recoveries, procedural as well as substantive Due

Process concerns are implicated. Hypothetically, consider a case in which class counsel billed \$1 million of attorney time and another \$1 million of paralegal time, a class settlement was reached awarding \$5,000 to class members, and the question of fees was submitted to the court. A multi-million dollar fee award would be *per se* unreasonable. See, e.g., *Farrar v. Hobby*, 506 U.S. at 114. It would violate the Due Process rights of a defendant, who, like VWGoA in this case, correctly discerns the *de minimis* nature of the controversy, and settles the case on that basis, but cannot reasonably be expected to anticipate that the court would fail to apply established fair and objective standards requiring that a “reasonable” attorney’s fee “bear some relation to the award” recovered by the class. See, e.g., *O’Brien*, 768 S.W.2d at 71, n. 13.

Due Process concerns apply for the same reason, in the present case. When entering into a settlement on class liability, VWGoA reasonably assumed that it was given notice by cases such as *O’Brien*, *Tusa*, *Trout*, and *Knopke*, that any fees awarded would be fair and “reasonable”, and would appropriately take into account the recovery actually obtained by class members. A rule of law that permits attorneys to take 49 times the class recovery, in due process terms, lacks “an understandable meaning with legal standards that courts must enforce”. *Giaccio v. Pennsylvania*, 382 U.S. at 403.

The standard applied here led to a confiscatory result that does not substantively pass constitutional muster. See, e.g., *St. Louis, I. M. & S. Ry. Co. v. Williams*, *supra*; *Southwestern Tele. & Tele. Co. v. Danaher*, *supra*. And given the lack of any meaningful advance notice to VWGoA that such a standard would apply to this fee determination, the fee ruling violated VWGoA's procedural due process rights, as well. See *Giaccio v. Pennsylvania*, *supra*.

The important constitutional safeguards applied by federal courts and Missouri courts in punitive damages cases should apply equally to an award of attorney's fees in a class action. The present case (unlike *Kelly*) involved a settlement. The settlement class was only 1.25% of the nationwide class on behalf of which this lawsuit was initiated. The settlement claims process took a full census of the supposedly aggrieved class, offered extremely generous benefits to claimants, but very few class members claimed to have experienced failures, as evidenced by a total monetary recovery of approximately \$125,000. Neither the \$6,147,000 fee awarded by the trial court nor the \$3,087,000 award of the Court of Appeals can survive Constitutional scrutiny any more than an equivalent punitive damage claim, fine or penalty, or other deprivation of property, however labeled, of 24.6 or 49 times the maximum compensable harm. Each contravenes Due Process as

“an application, not of law and legal processes, but of arbitrary coercion.”

*BMW of North America, Inc. v. Gore*, 517 U.S. at 587.

### **CONCLUSION**

There is no justification and no legal authority to support either a \$6,174,000 or \$3,087,000 attorney’s fee award in this action where the total relief to the class was only \$125,621. This Court should reverse reduce and remit the award to an amount which bears a relation to the class recovery, consistent with Missouri and U.S. Supreme Court case law, sound policy, and constitutional strictures. That amount should be significantly below the “lodestar” amount of Class Counsel’s fees, under *O’Brien* not more than \$665,000. Under controlling Constitutional precepts, it should not approach and cannot exceed ten times the \$125,621 recovered by the plaintiff class.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE (Rule 84.06(c))**

The undersigned hereby certifies, pursuant to Rule 84.06(c), that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the requirements of Missouri Supreme Court Rule 84.06(b); and (3) contains 19,207 words, as calculated by the Microsoft Word software used to prepare this Brief.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above and foregoing Substitute Brief of Appellant was served using the Court's electronic filing system, this 12<sup>th</sup> day of October, 2012, upon:

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